

Could moonlighting employees be breaching more than just their employment contracts?

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Introduction

Facts

Issues

Implications for moonlighting employees

Introduction

In Hong Kong, there is an increasing emphasis on the importance of reciprocal duties of trust and confidence between employers and employees. 'Moonlighting' employees (even ones who take up ancillary employment with a non-direct competitor) often sit in a legally precarious position, since questions are bound to arise in relation to their fiduciary duties, restrictive covenants and the implied term of trust and confidence. Moonlighting employees are also at risk of committing an offence under Section 9 of the Prevention of Bribery Ordinance (Cap 201), which is concerned with transactions between third parties and agents in relation to the affairs or business of their principals.

This update discusses the Hong Kong Court of Final Appeal judgment in *Secretary for Justice v Chan Chi Wan Stephen*(1) and examines the circumstances which would render an employee guilty of bribery in the private sector.

Facts

This case considered whether Chan – who was general manager of television station TVB while also voluntarily hosting a television segment for TVB's pay channel – committed the offence of bribery pursuant to the Prevention of Bribery Ordinance by contracting with a third party to host an external television segment. In accordance with the Prevention of Bribery Ordinance, Chan was an agent of TVB by virtue of being an employee of TVB.

The incident arose when TVB contracted with Olympian City, a Hong Kong shopping centre, to produce a New Year's Eve event. Olympian City subsequently entered into a separate agreement with Chan's agent, Tseng, for Chan to host a live rendition of his television segment at the New Year's Eve event broadcast. Chan received HK\$112,000 from Tseng as remuneration for this engagement but did not seek or obtain prior permission from TVB. Nevertheless, the evidence showed that Chan's engagement to host the external television segment was generally known to TVB.

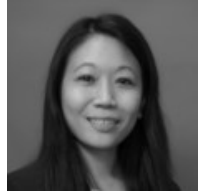
As a result, Chan was charged in the alternative for:

- "accept[ing] an advantage... as an inducement or reward for or otherwise on account of [him] doing or having done an act in relation to his principal's affairs or business" contrary to Section 9(1) of the Prevention of Bribery Ordinance; or
- conspiring with Tseng to commit the Section 9(1) offence.

Tseng was also charged with the offence of bribery pursuant to Section 9 of the Prevention of Bribery Ordinance. While both Chan and Tseng were acquitted at first instance, the lower court's decisions were overturned by the Court of Appeal. On further appeal, the Court of Final Appeal unanimously quashed the convictions.

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Issues

The primary issues before the Court of Final Appeal were as follows:

- What is the mental element required to render an agent guilty under Section 9 of the Prevention of Bribery Ordinance?
- Should "in relation to the principal's affairs or business" be interpreted as requiring an element of prejudice to the principal?
- How should the Hong Kong courts approach the defence of "reasonable excuse" under Section 9 of the Prevention of Bribery Ordinance?

Mental element

To secure a conviction under Section 9 of the Prevention of Bribery Ordinance, the prosecution must prove that the agent "knew or believed" that the advantage was provided as an inducement or reward or otherwise. In other words, if the agent receiving an advantage was unaware that the advantage was offered for a corrupt purpose, they will not be liable. Since the prosecution failed to establish that Chan knew or believed that the remuneration that he received for hosting the external television segment was for a corrupt purpose, Chan could not be held culpable for the Section 9 offence.

"In relation to the principal's affairs or business"

The Court of Final Appeal determined that Section 9 of the Prevention of Bribery Ordinance required an individual's mischief which is "aimed at the principal's business" to be conduct which "subvert[ed] the integrity of the agency relationship to the detriment of the principal's interests". Conduct which is beneficial to and aligned with the interests of the principal would fall outside the scope of Section 9. In accepting remuneration to host the external television segment, Chan had not intended to influence or affect TVB's affairs or business in a manner that undermined the integrity of his agency relationship with TVB. Consequently, Chan could not be held culpable for the Section 9 offence.

Reasonable excuse

'Reasonable excuse' may be a defence to an act that would otherwise contravene Section 9 of the Prevention of Bribery Ordinance. Since the Court of Final Appeal did not consider that Chan had breached Section 9 (for the reasons stated above), the majority of the judges saw no basis for assessing the defence in this case. However, Judge Tang maintained a different view and thus elaborated on the 'reasonable excuse' defence. Specifically, Tang held that Chan had a reasonable excuse for hosting the external television segment as he "honestly believed that his principal would not object" to his participation.

Implications for moonlighting employees

Although this judgment may bring a sigh of relief to moonlighting employees, it certainly does not provide *carte blanche* for multiple employment (especially where the employers are in the same industry). The decision on whether Section 9 of the Prevention of Bribery Ordinance has been breached is fact-sensitive and dependent on factors such as the agent's intentions and the nexus between the principal's business and the third party's terms of engagement. Moonlighting employees should seek their employer's informed written consent before taking on additional employment in order to ensure compliance with their employment obligations and steer clear of any potential criminal prosecution.

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Endnotes

(1) [2017] HKEC 505.

